MEMORANDUM OF LAW

DATE: February 4, 1992
TO: Severo Esquivel, Deputy City Manager
FROM: City Attorney
SUBJECT: Proposed Imposition of Surcharge on all Development and Land Use Permits

This memorandum is in response to your request that this office assess the legality of imposing a "surcharge" on all development projects and land use permits to be used for general enforcement purposes and not necessarily for enforcement actions related to that permit. You have also asked for background information regarding such a surcharge and any restrictions on its usage.

After reviewing this proposal, it is the conclusion of this office that unless the surcharge is reasonably related to the development project or land use permit and also confers a benefit upon the permittee, the surcharge is likely to be considered a special tax rather than a regulating fee and would require two-thirds voter approval.

1. Legality of Imposing a Surcharge on Permit Fees in General

The term "surcharge" in general is most frequently used in California caselaw and statutes as well as Attorney General Opinions to refer to an extra fee charged to an existing fee or fine for the purposes of funding a special program or project. Some examples are: 1) Health and Safety Code section 10605(b) which establishes a surcharge of $4.00 to be added to the fee for obtaining a certified copy of a birth certificate; the surcharge is used to fund either the County Children's Trust Fund or the State Children's Trust Fund pursuant to the Welfare and Institutions Code. See 66 Op. Cal. Att'y Gen. 170 (1983); 2) Government Code section 76000 establishes a surcharge of $1.50 to be added to fines imposed for parking offenses; the monies raised by the surcharge are used to fund the construction of justice facilities and the justification for the surcharge is that the processing of parking cases in the courts is a heavy burden on the court facilities. See 65 Op. Cal. Att'y Gen. 568 (1982). See also West Hollywood Concerned Citizens v. City of West Hollywood, 232 Cal. App. 3d 486 (1991), holding valid a city ordinance charging landlords an additional surcharge to be added to a registration fee for rental units which is then used to fund a rent control program.

In order to clearly assess the legality of the City Manager's proposal to add a "surcharge" to permit fees, it would be more accurate to characterize the proposed surcharge as merely an increase in the existing fee amount charged for development and land use permits.

Any increase in the amount of fees presently charged for these

permits would have to follow the rule for the enactment of permit fees in general. Essentially, any permit fee imposed pursuant to a municipality's regulatory power, must not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity. 9 McQuillan, Mun. Corp., Section 26.32b (3d ed. rev.). See Mills v. County of Trinity, 108 Cal. App. 3d 656 (1980), holding that any regulatory fee must not "exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought" in order to be considered a fee rather than a tax. In United Business Commission v. City of San Diego, 91 Cal. App. 3d 156, 165 (1979), a fee charged for building permits and signs was upheld as regulatory in nature as the amount of the fee did not exceed the expenses necessary in carrying out the regulatory procedure of "investigation, inspection, and maintenance of a system of supervision and enforcement."

In short, if the City can justify that the proposed increase in permit fees is necessary to cover increased costs of regulation, then the additional monies charged are legally valid. Courts generally look to the language of the ordinance imposing the fee and to cost analysis reports and studies prepared by government officials in evaluating whether a particular fee is for cost reimbursement or revenue raising purposes. 71 Op. Cal. Att'y Gen. 286 (1988); United Business Commission, 91 Cal. App. 3d at 165-168.

A general rule of thumb which can be used in ensuring that a permit fee is regulatory in nature is to examine whether the permit fee bears a reasonable relation to the necessary or probable cost of regulation or providing the service. Plumas County v. Wheeler, 149 Cal. 758 (1906); 9 McQuillan, Mun. Corp., Section 26.15 (3d ed. rev.). Please note, however, that a permit fee must be definite in amount or dependent upon an established, definite and legal measure and not left to the unrestricted discretion of government officials. 9 McQuillan, Mun. Corp., Section 26.32a (3d ed. rev.).

For general background information, it is important to keep in mind that any fee, whether it be for a license or permit or merely for purposes of cost recovery must be carefully analyzed to ensure that it is enacted for regulatory purposes under the City's police power and not merely for revenue raising purposes. If enacted purely for revenue raising purposes, then the fee constitutes a "special tax" within the meaning of Section 4 of Article XIIIA of the California Constitution (Proposition 13) and thereby requires the approval of two-thirds of the voters before imposition.

To determine whether a governmental fee is actually a regulatory fee under the police power rather than merely a revenue raising fee, courts traditionally will analyze the use of the fee involved rather than relying on its label. United Business Commission, 91 Cal. App. 3d at 165; Mills v. County of Trinity, 108 Cal. App. 3d 656 (1980). Here the

City Manager has clearly stated that the "surcharge" to be added to development and land use permits is to be used for general enforcement purposes. A fee used for general enforcement purposes is generally considered to be a regulatory fee which can be imposed pursuant to the direct grant of police power to a municipality under Article IX, Section 7 of the California Constitution. Furthermore, land use regulations have been held by the courts to fulfill a legitimate public welfare purpose under the police power. Mills v. County of Trinity, 108 Cal. App. 3d 656, 662 (1980).

2. Legality of Charging a Permit Fee to be used for Enforcement Purposes not Necessarily Related to that Permit.

Hypothetically speaking, your proposal would involve assessing fees for new development projects and land use permits for the general city-wide enforcement of litter, fire, building or other regulations or services.

Keeping in mind that a permit fee can be defined as "a charge for the privilege granted by the permit," 9 McQuillan, Mun. Corp., Section 26.32 (3d ed. rev.), and the holding in United Business Commission v. City of San Diego, 91 Cal. App. 3d 156 (1978), which stated that a permit fee must be related to the inspection, inventory, administration and enforcement cost of the permit in question, it would follow that any increase in development and land use permit fees should be based on an increase in the cost of enforcement related to that particular land use permit, not general city-wide enforcement costs. Again, any monies exceeding the regulatory costs mentioned above will likely be considered a "special tax" and therefore subject to voter approval.

In absence of caselaw directly on point, it is helpful to look at the legal parameters applicable to development fees in California which are designed to compensate the public for any increased burden on public services which can be attributed to the new development. Fees charged to developers are a valid exercise of the police power and are not considered to constitute a special tax so long as the fee does "not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." Bixel Associates v. City of Los Angeles, 216 Cal. App. 3d 1208, 1211 (1989); Gov't Code Section 50076. Municipalities must justify and account for developer fees imposed as a condition of approval of a development project. Gov't Code Section 66000 through 66003.

The U.S. Supreme Court and California courts have held that there must be some connection or "nexus" which exists between the burdens created by a particular development and the condition imposed by the government. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); Surfside Colony Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1263 (1991); See also Russ Bldg. Partnership v. City and County of San Francisco, 199 Cal. App. 3d 1496 (1987), which upheld an

ordinance requiring owners of new buildings to pay a transit fee as a condition of obtaining a certificate of completion and occupancy. The Court in Russ Bldg. Partnership found the fee to be directly related and limited to the cost of increased municipal transportation services caused by the particular development. Using the legal requirements applicable to development fees as a guide, it would follow that in order to justify any increase in development and land use permit fees, the increase should be directly related to cost of enforcement for that particular permit.

Furthermore, California caselaw cautions against charging one group of citizens for services irrespective of whether the services are used by or rendered to those citizens. 62 Op. Cal. Att'y Gen. 831 (1971). In the case of City of Glendale v. Tronsden, 48 Cal. 2d 93, 102 (1957), the Court held that a garbage fee charged to all residents, irrespective of use, constituted a tax. See also Bixel Associates v. City of Los Angeles, 216 Cal. App. 3d 1208 (1989), holding a fire hydrant fee charged to a developer was invalid as it did not bear a fair and reasonable relation to the developer's benefit from the fee. Given the decisions above, it could conceivably be argued that an applicant required to pay a fee for a land use permit who is actually being charged for services not related to that permit, i.e., building code enforcement and who receives no direct benefit from the enforcement of building laws, is in essence being charged a special tax.

The term special tax is referred to in Government Code section 50076 as follows: "`Special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Emphasis added.) See also Mills v. County of Trinity, 108 Cal. App. 3d 656, 660 (1980), holding special taxes to "exclude charges against particular individuals for governmental regulatory activities where the fees involved do not exceed the reasonable expense of the regulatory activities."

In sum, the "surcharge" or increase in permit fees must be shown to be reasonably related to the development project or land use permit and confer a benefit upon the permittee or it is likely to be considered a special tax rather than a regulatory fee and will require two-thirds voter approval.

JOHN W. WITT, City Attorney
By
Diane Silva-Martinez
Deputy City Attorney

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